90-1632

No. _____

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NICHOLS B. MEAIGE, JR.,
Petitioner,

vs.

HARTLEY MARINE CORPORATION,
Respondent.

**Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

1. Whether a seaman pilot with an exemplary work record who is fired solely and exclusively for his refusal to violate a federal maritime safety statute has a cause of action under the General Maritime Law for wrongful discharge.

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NICHOLS B. MEAIGE, JR.,
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**On Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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The petitioner Nichols B. Meaige, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on February 5, 1991.

## REFERENCES TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 925 F.2d 700 (4th Cir. 1991), and appears in the appendix to this petition at page A-1. The opinion of the United States District Court for the Southern District of West Virginia, Parkersburg Division, is unreported and appears in the appendix at page 6a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 5, 1991. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

## STATUTORY PROVISIONS INVOLVED IN THIS CASE

Section 8104(h) of 46 U.S.C. states:

> (h) On a vessel to which section 8904 of this title applies, an individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency.

Section 8104(j) of 46 U.S.C. states:

> (j) The owner, charterer, or managing operator of a vessel on which a violation of subsection (c), (d), (e), or (h) of this section occurs is liable to the Government for a civil penalty of $500. The seaman is entitled to discharge from the vessel and receipt of wages earned.

Section 7703 of 46 U.S.C. states:

> A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if, when acting under the authority of that license, certificate, or document, the holder —
>
> (1) has violated or failed to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters.
>
> (2) has committed an act of incompetence, misconduct, or negligence.

## STATEMENT OF THE CASE

### A. Procedural History

Petitioner Meaige asserted a claim under the General Maritime Law for wrongful discharge. Captain Meaige was fired for refusing to operate the Hartley Marine M/V Point, without relief, on a voyage that would constitute a per se violation of 46 U.S.C. section 8104(h).

Meaige further asserted that compliance with the employer's order would have required the petitioner to operate the M/V Point in excess of maximum number of hours allowed in a twenty-four hour period pursuant to 46 U.S.C. Section 8104(h).

Petitioner filed a motion for partial summary judgment on November 7, 1989. This motion asserted that the defendant's actions in discharging Captain Meaige for his refusal to violate 46 U.S.C. 8104(h) required a finding of liability against the employer on the claim for wrongful discharge.

The court denied petitioner's Meaige's motion by order dated January 12, 1990, and sua sponte dismissed the wrongful discharge claim pursuant to Rule 12(b)6 of the Federal Rules of Civil Procedure. (A-6a)

On January 22, 1990, the plaintiff filed a motion to certify certain questions to the Supreme Court of Appeals of West Virginia on the issue of whether defendant's actions contravene a substantial public policy. This motion was denied by court order dated February 28, 1990.

On February 5, 1991, the Fourth Circuit Court of Appeals affirmed the decision of the District Court. *Meaige* v. *Hartley Marine Corporation*, 925 F.2d 700 (4th Cir. 1991) (reproduced in Appendix at A-1).

### B. The Ashland Fuel Run

Petitioner, Nichols B. Meaige, was employed by the defendant, Hartley Marine Corporation, beginning July 7, 1978.

Meaige's service record with Hartley was exemplary. He was never reprimanded for any reason nor had he received any bad work evaluations.

Hartley Marine maintains a midstream refueling operation in Point Pleasant, West Virginia. This service is used by line haul vessels traveling long distances on the Ohio River. When a line haul vessel is in need of fuel, supplies, lube oil, and other such equipment, Hartley dispatches one of its harbor tugs to meet the larger vessels. The two vessels then tie off to one another and travel up or down the Ohio River until the transfer of fuel or supplies is completed.

Prior to March, 1988, Hartley had contracted with larger line haul vessels (3200 horse power or larger) to pick up and deliver its fuel barges from the Hartley landing at Point Pleasant, West Virginia, to the refinery operated by Ashland Oil at Kenova, West Virginia.

In March, 1988, Hartley made the decision that it would be less costly to dispatch its own harbor tug, the M/V Point (460 horse power) from Point Pleasant to Kenova to refill its fuel barge (three hundred thousand gallon capacity).

The voyage wherein the harbor tug was dispatched from Hartley to Ashland Oil came to be known as the Ashland fuel run.

It was not unusual for the round trip between Hartley and Ashland Oil to take between twenty-four and thirty-six hours. There was no relief crew on the M/V Point during the Ashland fuel run.

The M/V Point had no running water, shower, or restroom facilities. Hartley's manager testified the commode was used by placing a trash bag aroung the seat and defecating and urinating therein. Other than a bench in the wheelhouse there were no sleeping facilities or bunks on board the M/V Point. There were no cooking facilities nor refrigerators on the M/V Point.

The M/V Point was equipped with a complement of two crewmembers, one pilot (operator) and one deckhand. Hartley had previously supplied a third crewmember, an engineer or mechanic, to assist during the fuel run but this practice was discontinued. The pilot was required, in addition to navigating the boat, to mind the gauges in the pilothouse, to maintain the engine room, and to keep the vessel going in the event of breakdown.

Numerous employees filed complaints with Hartley about the working conditions of the Ashland fuel run. The fatigue conditions during the Ashland fuel run were such that the pilot was required to sleep and allow his unlicensed deckhand to operate the towing vessel.

The pilot was on call and required to be available around the clock from port to port. This is reflected in the fact that the pilot was paid for every minute of his time, from the point that he left Hartley to the point of return.

Meaige was the pilot on approximately ten Ashland fuel runs. While awaiting the refueling of the tank barge on what would be his final Ashland fuel run Meaige telephoned Hartley from Catlettsburg, Kentucky. During this telephone conversation both Meaige and deckhand Rex Patterson requested relief. They indicated that they were too fatigued to safely make the return trip from Ashland Oil to Hartley.

After being denied relief, Meaige began the return trip to Point Pleasant, West Virginia. On the return trip, while attempting to navigate the lock chamber at Gallipolis Locks and Dam, the tank barge in tow containing three hundred thousand gallons of diesel fuel collided with the lock wall. While there were no serious injuries or spills resulting from this collision, the occurrence hardened Meaige's resolve not to undergo any additional Ashland fuel runs unless/until the employer agreed to provide relief or rest so as to permit him to stay within Coast Guard regulations for safety.

When Meaige was approached in March, 1988, to make

the next Ashland fuel run, he stated he could not safely perform the run. The petitioner further stated that he would no longer be making the run unless a relief crew was made available. In refusing to make the fuel run, Meaige indicated that the requirement of remaining on duty continuously for over twenty-four hours was excessive, unsafe, and contrary to law.

It is undisputed that Meaige was thereafter discharged solely and exclusively for refusing to make the Ashland fuel run.

## REASONS FOR GRANTING THE WRIT

### A. This Case Presents an Important Issue Relating To The Rights Of Seaman Pilots Under The General Maritime Law Which Has Not Yet Been, But Should Be Decided By The United States Supreme Court.

For over a century Federal Courts have adhered to the principle that seamen are wards of admiralty entitled to favor and guardianship. In 1823, Justice Story laid down those principles in *Harden* v. *Gordon*, F Cas No 6047 (1823, CC Me), in an opinion quoted, in part, 119 years later by the U.S. Supreme Court in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 87 L.Ed. 239, 63 S.Ct. 246 (1942).

> Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel . . . They are emphatically the wards of admiralty.

The protection currently afforded seamen against wrongful discharge does not reflect a policy of guardianship but rather a policy of indifference to the safety of the seaman and the waterways upon which they ply their trade.

During the last decade, Courts have begun to provide at least a modicum of protection and due process to employees. All but a few jurisdictions recognize causes of action for wrongful discharge in breach of public policy. See: National Employment Law Inst., Employment-At Will: A 1989 State-By-State Survey (1990).

West Virginia, the home state of seaman Meaige and his employer, is among the more progressive states in providing strong remedies for wrongfully discharged employees. *Harless* v. *First National Bank of Fairmont*, 246 S.E.2d 270 (W.Va. 1978).

Yet, because Meaige is a river pilot whose employment is covered under General Maritime Law, he does not benefit from the protection afforded other working men and women

in the state of West Virginia, and most other states in the Union. Far from being treated as a ward of the Court, Captain Meaige is orphaned by a General Maritime Law that provides no shelter to the wrongfully discharged.

The lead case in this area, *Smith* v. *Atlas Off Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), held that the discharge of a seaman in retaliation for the exercise of his legal right to file a personal injury action against the employer constitutes a maritime tort.

The Court of Appeals below severely limited the impact of *Smith*, holding that only one exception exists to the general at-will employment in maritime law: a seaman may file a personal injury action without retaliation.

Petitioner Meaige prays that the Court grant the writ to determine whether another narrow exception to the employment at-will doctrine should be acknowledged. This exception would permit a cause of action when a maritime pilot is fired for refusing to violate a federal safety statute.

This exception was endorsed by the Texas Supreme Court in *Sabine Pilot Services, Inc.* v. *Hauck*, 687 S.W. 2d 733 (Tx. 1985).

Such a ruling would be consistent with this Court's position in *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1955), wherein the court held that pilots hold a unique position in the maritime world. Writing for the majority, Justice Black held that under law and custom pilots have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer.

Captain Meaige exercised his best judgment and elected not to embark on a voyage that would consitute a per se violation of his Coast Guard license under 46 U.S.C. 4106(h). Recognizing the risk to himself, his deckhand, and the Ohio river valley, Captain Meaige refused to make the Ashland fuel run without adequate relief. He was fired solely and exclusively for his refusal to violate federal law.

The Court below inaccurately held that the proscriptions of 46 U.S.C. 4106(h) are directed against the employer and that it [4106(h)] provides only a small fine for violations.

A violation of 46 U.S.C. 4106(h) is incorporated in the enforcement of 46 U.S.C. 7703, which imposes harsh penalties against persons holding a Coast Guard license for violations of federal safety statutes. Coast Guard administrative actions against pilots often result in suspension of the privilege of operating towing vessels. *United States of America: United States Coast Guard vs. License No. 70703, Issued to William Pence*, Coast Guard Docket No. 02-0002-RAD-89, (reproduced at A-11a) is an example of such a prosecution.

This Court has not addressed the application of wrongful discharge in the maritime context. Admiralty Courts have a special obligation to exercise what the *Smith* court termed "[t]he judiciary's leading role in fashioning controlling rules of maritime law and in reshaping old doctrine to meet changing conditions." *Smith*, *supra*, at p. 1063.

The lower court's suggestion that Meaige could have reported violations to the Coast Guard rather than refused the assignment ignores the reality of service as a pilot.

First, Meaige is captain of the vessel. He is responsible for the safety of his crew and of the cargo. It would be the captain and not the employer who would be accountable to the Coast Guard for violations of safety statutes. In effect, the lower courts would require Meaige to turn himself in to the Coast Guard for the employer's refusal to furnish adequate relief.

Unlike voyages on the high seas where crews are set at the time of embarkation, inland vessels are usually crewed during the course of the voyage. It is not unusual for a trip to run over due to unexpected delays. If the company fails to secure relief for its licensed personnel, as Hartley did on Meaige's final Ashland fuel run, is the pilot expected to immediately

surrender himself and his license to the Coast Guard? At some point the law must reflect the realities of the real world.

Second, it is unconscionable that the employer is permitted to walk away from this matter with impunity. If the undersigned attorney were to fire his at-will secretary for refusing to forge an affidavit would her cause of action fail because she could have reported the violation to the Covington, Kentucky police department?

The protection of seaman pilots and of the navigable waterways depend upon adherence to federal safety rules. The lower court's willingness to permit maritime employers to coerce pilots into per se violations of federal law is not consistent with the obligation to provide solace to the "wards" of admiralty.

Reference is made to this Court's reasoning in *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970), wherein the Court created a cause of action for wrongful death under general maritime law, without specific statutory authority. See also: *Feemster* v. *BJ-Titan Services Co./Titan Services, Inc.: The At-Will Doctrine Resurgent in Admiralty*, 64 Tulane Law Review, p. 949 (1990).

## CONCLUSION

Captain Meaige has lost his life's work for refusing to act in a manner contrary to federal law. A writ of certiorari should be issued to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 90-1011

NICHOLAS B. MEAIGE, JR.,
*Plaintiff-Appellant*,

vs.

HARTLEY MARINE CORPORATION,
*Defendant-Appellee*,

and

MIDLAND ENTERPRISES, INCORPORATED,
*Defendant*.

Appeal from the United States District Court for the Southern District of West Virginia, at Parkersburg. Charles H. Haden II, Chief District Judge. (CA-89-575-A)

Argued: October 30, 1990 — Decided: February 5, 1991

Before HALL and NIEMEYER, Circuit Judges, and CACHERIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Hall wrote the opinion, in which Judge Niemeyer and Judge Cacheris joined.

ARGUED: Steven Carroll Schletker, Covington, Kentucky, for Appellant. George Daniel Blizzard, II, SHAFFER &

SHAFFER, Madison, West Virginia, for Appellee. ON BRIEF: Gary E. Pullin, Charleston, West Virginia, for Appellant. Anthony J. Cicconi, SHAFFER & SHAFFER, Madison, West Virginia; Ronald Parry, Covington, Kentucky, for Appellee.

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HALL, Circuit Judge:

Nicholas B. Meaige, Jr., appeals the district court's dismissal of his wrongful discharge action for failure to state a claim under either general maritime law or West Virginia common law. We affirm.

I.

Meaige was employed by Hartley Marine Corporation from 1978 until his dismissal in 1988. He worked as a deckhand and pilot on vessels operating on the Ohio River, and, from time to time, he would be called upon to serve as a pilot on the "Ashland fuel run." The Ashland fuel run involved a round trip between Point Pleasant, West Virginia, and Kenova, West Virginia, where the fuel barges in tow were loaded at an Ashland Oil refinery. The Ashland fuel run would last as long as thirty hours, depending on the water level and how long reloading took at the Ashland Oil facility.

The crew on the Ashland fuel run consisted of a pilot and a deckhand. The pilot was required to be available around the clock from port to port. There were no sleeping accommodations on board the boat, no cooking facilities, except for hotplates, and no refrigerator. Toilet facilities consisted of a garbage bag. Meaige piloted the Ashland fuel run approximately ten times. On Meaige's last fuel run, while waiting for the barges to be reloaded, he telephoned his supervisor and requested a relief crew. He explained that he and the deckhand were too fatigued to safely make the return trip. His supervisor refused to supply a relief crew, and, on the return trip, the barges were involved in a minor collision with the lock walls in the Gallipolis Locks.

In March 1988, Meaige's supervisor again requested that he

make the Ashland fuel run. Meaige refused and stated that he would not make any more fuel runs unless a relief crew was made available. He further complained that twenty-four hours was too long to stay on the boat, that there was a lack of shower and bathroom facilities, and that the boat was too noisy. Meaige's supervisor discharged him at that time.

Meaige filed suit on October 24, 1988. Meaige's first amended complaint included a claim for wrongful termination.[1] He alleged that compliance with his employer's order to make the Ashland fuel run required him to operate the boat in excess of the maximum number of hours legally allowed in a twenty-four hour period. 46 U.S.C. § 8104(h). The district court denied Meaige's motion for partial summary judgment and dismissed *sua sponte* his wrongful discharge claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim under general maritime law or West Virginia common law. He appeals.

II.

Appellant raises two arguments. He asserts, first, that the district court erred in dismissing his wrongful discharge claim for failure to state a cause of action under general maritime law and, second, that the court erred in dismissing his claim for failure to state a cause of action under West Virginia common law. We affirm for the following reasons.

As a preliminary matter, we note that we review *de novo* the district court's dismissal of appellants' case. This court should not affirm the district court unless the facts alleged by appellant could not, if proven, entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

A.

Under general maritime law, a seaman is an employee-at-

[1] Meaige's complaint further alleged a cause of action for injuries suffered in August 1986, within the scope of his employment. This claim for personal injury was settled and is not part of this appeal.

will and may be discharged for any or no reason. *Smith* v. *Atlas Off-Shore Boat Serv.*, 653 F.2d 1057 (5th Cir. 1981). Only one exception exists to the general at-will employment rule in maritime law: a seaman may file a personal injury action without retaliation. A recent Fifth Circuit case, *Feemster* v. *BJ-Titan Servs. Co./Titan Servs.*, 873 F.2d 91 (5th Cir. 1989), involved the same statute, 46 U.S.C § 8104(h), that underlies appellant's claim. The *Feemster* court held, on facts similar to appellant's, that there is no private right of action under general maritime law arising from discharge for refusal to carry out an assignment that would violate a federal statute. *Id.* at 93. We adopt the reasoning of *Feemster*.

Appellant attempts to distinguish *Feemster* by arguing that appellant had made the Ashland fuel run numerous times before refusing, and, therefore, the violation of § 8104(h) was not speculative as it was in *Feemster*. We are unconvinced. First, the statute's proscriptions are aimed at employers, and it provides only a small fine for violations. Second, the Coast Guard is the agent of enforcement of maritime safety and seaman protection laws; therefore, Meaige "can complain of safety violations to the Coast Guard and enlist its aid to prevent violations." *Id.* at 93-94. Third, no private right of enforcement was intended by Congress under § 8104(h). *Id.* (citing H.R. Rep. No. 338, 98th Cong., 1st Sess. 113 (1983) U.S. Code Cong. & Admin. News 1983, p. 924). The district court's dismissal for failure to state a claim under federal maritime law is affirmed.

B.

We also affirm the district court's judgment dismissing appellant's action for failure to state a claim under West Virginia common law, but on different reasoning. Appellant and the district court failed to recognize the exclusive nature of federal admirality law. "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Uniformity of application throughout the nation is a central purpose and feature of this

exclusive jurisdiction. *The Lottawanna (Rodd* v. *Heartt)*, 21 Wall. (88 U.S.) 558, 575 (1874).

Although the Fourth Circuit recognizes that admiralty law sometimes looks to state law for the rule of decision, it does so only when there is no admiralty rule on point and when doing so would not undermine uniformity. *Byrd* v. *Byrd*, 657 F.2d 615 (4th Cir. 1981). In this case, there is a body of federal maritime jurisprudence relating to wrongful discharge, and turning to West Virginia for the rule of decision would clearly undermine uniformity in federal admiralty law. Therefore, though it was error to look to West Virginia common law for a rule of decision, we affirm the district court's judgment dismissing the claim.[2]

AFFIRMED.

[2] Meaige filed a motion to certify questions to the West Virginia Supreme Court of Appeals to determine whether Meaige's termination was actionable as a contravention of a substantial public policy of that state. The district court denied Meaige's motion, and Meaige also appeals the district court's denial. The decision to certify questions to a state court is clearly discretionary. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). In light of our reasoning affirming the district court's dismissal of appellant's claim based on West Virginia common law, we affirm the district court's denial of the motion to certify.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
PARKERSBURG DIVISION

CIVIL ACTION NO. A:89-0575

NICHOLAS B. MEAIGE, JR.,
*Plaintiff,*

vs.

HARTLEY MARINE CORPORATION, et al.,
*Defendants.*

**MEMORANDUM OPINION AND ORDER**
(Entered Jan. 12, 1990)

Pending before the court are plaintiff's motions for partial summary judgment and for leave to file an amended complaint. The parties have submitted memoranda in support of their respective positions, and the matters are mature for the Court's consideration.

In this action, Plaintiff asserts a claim under the Jones Act and general maritime law for personal injuries resulting from an August 15, 1986, work accident. Plaintiff further asserts in paragraph 10 of the complaint that

> "the Plaintiff's injuries and damages . . . are in part a result of his retaliatory discharge wherein his employer terminated his employment without good cause, in bad faith, and for no other reason than his injuries sustained on August 15, 1986, and his resulting physical and occupational disability."

On November 7, 1989, Plaintiff filed a motion for partial summary judgment on the wrongful discharge claim asserting that his termination resulted not from his work related in-

juries, but from his refusal to make the "Ashland fuel run."[1] Plaintiff argues in support of the motion that the Ashland fuel run violates 46 U.S.C § 8104(h)[2] and that his termination for refusing to make the same was wrongful as a matter of law.

On December 4, 1989, Plaintiff filed a motion for leave to amend the complaint. In the proposed amended pleading, Plaintiff sets forth more particularly his allegations of wrongful discharge arising from the Ashland fuel run. Plaintiff further alleges in paragraphs 7 and 8 of the proposed amended complaint:

> "7. The plaintiff was physically unable to make the Ashland fuel run in a safe manner, in part, as a result of injuries suffered August 15, 1986.
>
> 8. That the Defendants' actions in terminating the Plaintiff for his refusal to make the Ashland fuel run, and the Defendants' actions in ordering the Plaintiff to make the Ashland fuel run, increased and intensified the effects of Plaintiff's injuries resulting from his August 15, 1986, on the job work injury."

After having carefully considered Plaintiff's motions and the arguments of counsel, the Court denies both of Plaintiff's motions. There is no express right of action for retaliatory discharge under 46 U.S.C. § 8104 for refusal to perform an unlawful act. Neither is there an implied right of action under general maritime law. *Feemster* v. *B. J. Titan Services*

[1] Plaintiff alleges the Ashland fuel run is a regularly scheduled refueling operation which routinely consumes twenty-four to thirty-six hours for a round trip.

[2] 46 U.S.C. § 8104(h) provides:

> "On a vessel to which section 8904 of this title applies, an individual licensed to operate a towing vessel may not work for more than twelve hours in a consecutive twenty-four hour period except in an emergency."

*Co./Titan Services, Inc.*, 873 F.2d 91 (5th Cir. 1989). Plaintiff must, therefore, resort to the common law wrongful discharge action developed in *Harless* v. *First National Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 240 (1978) and its progeny. To establish a cause of action under *Harless*, the Plaintiff must establish that his discharge contravenes a "substantial public policy."

In the aviation field, federal courts confronted with the issue of whether a state's public policy supports a wrongful discharge claim for employees who report airline safety concerns have concluded that no cause of action exists. In *Rachford* v. *Evergreen International Airlines, Inc.*, 596 F.Supp. 384, 385-386 (N.D. Ill. 1984) the court stated in granting the airline's motion to dismiss, that although "Illinois has a general policy in favor of aviation safety, the state has no interest in enforcing federal law, even if that federal law is incorporated . . . in the state's general public policy." Similarly, in *Buethe* v. *Britt Airlines, Inc.*, 787 F.2d 1194, 1197 (7th Cir. 1986), the court, in construing Indiana law, found that there was no express right created on the part of co-pilots or other crew members to refuse to fly an aircraft that they believe not to be airworthy. In doing so, the court stated that it "would be reluctant to imply such a right, when we consider the possible effects not only upon discipline but upon safety of giving crew members a veto power over the decisions of the captain." *Id.* at 1197.

Considering the permissive authority developed in the aviation field, along with the Fourth Circuit's recent decision in *Washington* v. *Union Carbide Corp.*, 870 F.2d 957 (4th Cir. 1989), where the court instructed that "the power to declare an employee's conduct is contrary to public policy is to be exercised with restraint . . . and with due deference to the West Virginia legislature as the primary organ of public policy of the state" (citations omitted), *Id.* at 962, 963, the Court concludes that there is no right of action premised in West Virginia public policy protecting the Plaintiff from discharge for refusing to carry out an assignment that may violate a federal safety statute.

The Court is likewise reluctant to permit the Plaintiff to merge his wrongful discharge claim with his Jones Act claim after discovery has been completed and after the pretrial order has been filed with the Court.

Plaintiff's motions for partial summary judgment and for leave to file an amended complaint are denied. The Court, on its own motion, dismisses Plaintiff's wrongful discharge claim pursuant to *Rule* 12(b)(6) of the Federal Rules of Civil Procedure.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: January 12, 1990

/s/ Charles H. Haden II, Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
PARKERSBURG DIVISION

CIVIL ACTION NO. A:89-0575

NICHOLAS B. MEAIGE, JR.,
*Plaintiff*,

vs.

HARTLEY MARINE CORPORATION, et al.,
*Defendants*.

**ORDER**
(Entered Jan. 18, 1990)

The Court hereby modifies its Memorandum Opinion and Order entered January 12, 1990, to reflect that Plaintiff's motion for leave to file an amended complaint is granted and the Clerk is directed to file the same.

The Court's opinion that Plaintiff failed to state a cause of action under general maritime law or West Virginia common law for wrongful discharge remains unchanged by the amended complaint. The Court's ruling on that issue obviates the need for the Defendant to file an answer to Plaintiff's amended complaint.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: January 18, 1990

/s/ Charles H. Haden II, Chief Judge

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Docket No. 02-0002-RAD-89

UNITED STATES OF AMERICA;
UNITED STATES COAST GUARD

vs.

LICENSE NO. 70703
Issued To: WILLIAM PENCE,

Respondent.

## DECISION & ORDER

ROSEMARY A. DENSON, Judge

### PRELIMINARY STATEMENT

In order to promote safety of life and property on navigable waters, Congress authorized the United States Coast Guard to initiate legal proceedings against the documents and licenses of merchant mariners. The objective of these proceedings is to maintain standards of competence and conduct of licensed and documented personnel, by insuring that they remain qualified to fulfill their responsibilites. These proceedings are brought pursuant to 16 U.S.C. 7703 and in accordance with the procedural requirements of 5 U.S.C. 551-9 and 46 C.F.R. Part 5.

On 14 February 1989 the Administrative Law Judge presided at the license suspension and revocation hearing of Respondent William Pence in Cincinnati, Ohio. He appeared personally accompanied by legal counsel. The Coast Guard had served Respondent with a charge of misconduct supported by a single specification, which states as follows:

FIRST SPECIFICATION: In that you, while serving as operator aboard M/V ELISHA WOODS, under the authority of the captioned license, did, on or about November 28 and 29, 1988 while underway on the Ohio River, a navigable water of the United States, wrongfully work as operator of said vessel for more than 12 hours in a consecutive 24 hour period when emergency conditions to said vessel did not exist, a violation of 46 USC 8104(b).

Respondent answered "no contest" to the charge and supporting specification. The Administrative Law Judge, satisfied that the response was voluntary, announced her decision at the hearing, finding the charge and specification proved by answer. The Coast Guard submitted the following exhibits: Exhibit 1, Affidavit of Service; Exhibit 2A, a Joint Exhibition of Stipulations and Exhibit 3, a Statement of Prior Record. Based on the answer and stipulated facts, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Respondent William Pence served as Operator, at all relevant times on 28 and 29 November 1988, under the authority of License No. 70703 onboard the M/V ELISHA WOODS (WOODS).
2. Respondent's license certifies that he is licensed to serve as an Operator of Uninspected Towing Vessels on the Western Rivers.
3. The WOODS is an uninspected towing vessel over 26' in length and is required by law to be under the actual direction and control of a licensed operator while underway.
4. Respondent relieved Frank Overton, Captain of the WOODS, of his watch at 0001 CST on 28 November 1988 while said vessel was transiting from Louisville, KY to Markland Dock and Dam, Markland, Indiana on the Ohio River.
5. Frank Overton relieved Respondent of his watch at 0530

CST on 28 November 1988 while said vessel was underway on the Ohio River, pushing three loaded and one empty barge, including the EBL 57.

6. The EBL 57 was loaded with Coal Tar Light Oil, a flammable cargo, regulated under Subchapter D of Title 46 of the Code of Federal Regulations.

7. At 0830 CST 28 November 1988 Respondent relieved Frank Overton as Operator of the WOODS at Markland Lock and Dam, Mile 531.5, Ohio River.

8. The WOODS departed Markland Dock and Dam upbound for Cincinnati, Ohio at 0915 CST 28 November 1988 without Frank Overton who left the vessel at Markland Lock and Dam.

9. When the WOODS left the Markland Lock enroute to Cincinnati, Respondent was serving as Operator until the vessel reached the McGinnis fleet at Mile 472.0 on the Ohio River at 2325 CST 28 November 1988.

10. At no time during the route from Markland Dam beginning at 0915 until it reached Mile 472.0 at 2325 CST on 28 November 1988 was Respondent relieved as Operator of the WOODS by any person onboard holding a U. S. Coast Guard license.

11. There were no emergency conditions existing on the WOODS during the transit from Markland Lock to the McGinnis Fleet which might have required continuous operation of the vessel by Respondent.

12. Frank Overton returned to the WOODS at the McGinnis Fleet at 0030 CST 29 November 1988 and relieved Respondent as Operator of said vessel at that time.

## OPINION

Respondent's answer of no contest is sufficient to support a finding of proved by answer and obviates the introduction of any evidence by the Coast Guard, other than that to show jurisdiction. *Appeals Decision 2060.* The Coast Guard established jurisdiction by the stipulation of facts by both parties.

## CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the United States Coast Guard by 46 U.S.C. 7703.
2. The specification under the charge of misconduct is proved by answer.
3. The charge of misconduct is proved.

To the extent that any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

## PRIOR RECORD

The Coast Guard showed that Respondent had no prior disciplinary record. Based upon the lack of a prior disciplinary record and information submitted in aggravation and mitigation, I find that an Order providing for an outright suspension and a period of probation is consistent with the remedial objective of this hearing.

## ORDER

It is now ordered that License No. 70703 and all other valid licenses and certificates issued to you by the United States Coast Guard, and now held by you, are suspended outright effective immediately on the service upon you or your legal representative of the Order. The outright suspension shall remain in effect until one month after the date on which you surrender your license to the closest U.S. Coast Guard Marine Safety Office, which you are hereby ordered to do immediately. You may surrender your license either in person or by mail. Your license is further suspended for an additional three months on twelve months probation, which additional suspension shall not be effective provided no charge under 46 U.S.C. 7703, 7704 or any other navigation or vessel inspection law is proved against you for acts committed during the foregoing outright suspension or for acts committed within

twelve months from the date of termination of the foregoing outright suspension.

If this probation is violated, the Order of suspension for which probation is granted shall become effective with respect to the present license and also any other document or certificate acquired by you during the period of probation, at such time as designated by the Coast Guard Administrative Law Judge finding the violation, and may be added to or form a part of any additional Order which is entered by such Judge.

You have the right to appeal this Decision and Order. The rules governing appeals are set forth in Title 46 C.F.R. 5.701 and 5.703 and are incorporated by reference.

/s/ JUDGE R. DENSON
U. S. Administrative Law Judge

Dated this 3rd day of May, 1989
St. Louis, Missouri.